

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Eric V. Herendeen,

Complainant,
vs.

Brett Corson,

Respondent.

NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING

**TO: Eric V. Herendeen, P.O. Box 318, Preseton, MN 55965; and
Brett Corson, 21688 State Highway 16, Wykoff, MN 55990.**

On November 1, 2006, Eric V. Herendeen filed a Complaint with the Office of Administrative Hearings alleging that Brett Corson violated Minn. Stat. § 211B.06, subd. 1. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth prima facie violations of Minn. Stat. § 211B.06.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **11:00 a.m. on Monday, November 6, 2006**. The hearing will be held by call-in telephone conference. You must call: **1-888-677-3757** at that time. Follow the directions and enter the numeric pass code **"17601"** when asked for the meeting number. The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be faxed to Administrative Law Judge Bruce H. Johnson at 612 341-7607.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based upon a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35. If the presiding Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401, or call 612/341-7610 (voice) or 612/341-7346 (TTY).

Dated: November 2, 2006

/s/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

The Complaint concerns a political advertisement that ran in at least five local newspapers (*Bluff County Reader*, *Chatfield News*, *Preseton Republican-Leader*, *Harmony New-Record* and the *Spring Valley Tribune*). Both Eric Herendeen and Brett Corson are candidates for Fillmore County Attorney. The Complaint alleges that that text in the advertisement pertaining Brett Corson's "opponent," who is Eric Herendeen, is false. The advertisement states that it was "Paid for by Brett A. Corson on his behalf." The Complaint alleges sufficient facts to conclude at this point that Corson had some involvement in the preparation of and distribution of the advertisement.

The advertisement is captioned "**Re-elect Brett Corson for Fillmore County Attorney**" and continues "I will not engage in negative and false campaign ads like my opponent. I believe in the truth." What follows is a statement "The truth about the Chatfield trailers and Rural Home Based Business is:" A six item list of statements follows. Herendeen contends numbers 5 and 6 are false.

Minn. Stat. § 211B.06

The Complainant alleges that number 5 and 6 in the advertisement contain false statements of fact in violation of Minn. Stat. § 211B.06. Section 211B.06 prohibits a person from intentionally preparing or disseminating false campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false. In *Kennedy v. Voss*,^[1] the Minnesota Supreme Court observed that the statute is directed against the evil of making false statements of fact and not against unfavorable deductions, or inferences based on fact - even if the inferences are “extreme and illogical.”^[2] The Court pointed out that the public is protected from such extreme and illogical inferences by the ability of other speakers to rebut these claims during the campaign process.^[3] In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.^[4]

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.^[5] A statement is substantially accurate if its “gist” or “sting” is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.^[6]

Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”^[7] The advertisement is campaign material.

Points Number 5 & 6

Point Number 5 reads:

My opponent failed to remove the trailers and restrict the business when he was the Assistant Fillmore County Attorney.

Point Number 6

Point Number 6 reads:

My opponent’s failure to act adversely affected the County.

The Complainants maintain these statements are false because: (1) he stopped working for the Fillmore County Attorney's Office in early January 2003, when he became the Chief Deputy Mower County Attorney; (2) he was rarely involved in zoning issues when he worked in the Fillmore County Attorney's Office and did not hear of the Chatfield trailers zoning issue until some time in 2005, long after he left the Fillmore County Attorney's Office; and (3) The Fillmore County Zoning Administrator did not notify the offending party of the zoning complaint involving semi-truck trailers until February 27, 2004. The Complainant states that he was never involved in the zoning issue involving the trailers because he did not work for Fillmore County when the issue arose and therefore the statement that Mr. Herendeen's actions "adversely affected" Fillmore County are also false.

The advertisement states that the Fillmore County Zoning Administrator negotiated and approved an agreement concerning the Chatfield trailers and Rural Home Based Business; that a District Court Judge signed an order approving the terms; that the Commissioners were advised; and that the agreement required the owner to clean up the property and restricted the business to approximately three acres. The advertisement does not state when these events occurred. The Complainant attaches a letter from the Fillmore County Zoning Office, dated February 27, 2004, regarding a complaint about the storage of semi-truck trailers on Dan Moulton's property in Chatfield, Minnesota.

Assuming the references in the advertisement concerning the Chatfield trailers and Rural Home Based Business relate to the circumstances recounted in the Fillmore County Zoning Administrator's letter, dated February 27, 2004, the allegations that Mr. Herendeen "failed to remove the trailers and restrict the business when he was the Assistant Fillmore County Attorney" and that his failure to act "adversely affected the County" can be proved true or false, and to that extend the complaint states prima facie violations of Minn. Stat. § 211B.06.

B.H.J.

^[1] 304 N.W.2d 299 (Minn. 1981).

^[2] *Id.* at 300.

^[3] *Id.*

^[4] *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing* *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

^[5] *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

^[6] *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

^[7] Minn. Stat. § 211B.01, subd. 2.